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No. 73-450

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# In the Supreme Court of the United States

OCTOBER TERM, 1973

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WILLIAM GROTH, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

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## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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ROBERT H. BORK,
*Solicitor General,*
*Department of Justice,*
*Washington, D.C. 20530.*

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the facts established entrapment as a matter of law, that the trial court improperly denied a continuance to permit petitioner to travel to India to take a deposition, and that the court improperly admitted statements made by a co-conspirator.

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of conspiracy to import and of importing hashish with intent to distribute, in violation of 21 U.S.C. 963, 960(a)(1), and 841(a)(1). He was sentenced to four years' imprisonment on each count, the sentences to run concurrently. The court of appeals affirmed (Pet. App. A).

The facts show that Terrence Burke, a special agent of the Bureau of Narcotics and Dangerous Drugs posing as a diplomatic courier for the United States, met co-

defendant Kapoor[1] in New Delhi, India (Tr. 192-197).[2] Prior to meeting with Kapoor, Agent Burke had been informed by a member of the German Embassy that Kapoor was using diplomatic couriers to smuggle narcotics into the United States (Tr. 321-325). Kapoor asked Burke to use his diplomatic passport to smuggle narcotics to a man in Los Angeles (Tr. 197-201, 335, 345-348). Kapoor told the agent to use the name "Mike Sullivan" and to call a certain telephone number and speak with "Mr. Shoe" (Tr. 202-203). He gave the agent a torn half of a Pakistani ten rupee note, which would identify the agent to the man in Los Angeles, to whom Kapoor was sending the other half of the note (Tr. 201-202). Burke was to give the narcotics to "Mr. Shoe," retain a portion of the money received, and send the balance to a third person in Germany (Tr. 199-201, 345-348). Kapoor then gave Burke a suitcase containing hashish (Tr. 199-201, 345-348).

Once in Los Angeles, Burke called the telephone number he had been given, identified himself as "Mike Sullivan" to a man who identified himself as "Mr. Shoe," and made arrangements for a meeting the next day (Tr. 216-217).[3] At the appointed place and time, petitioner walked up to Burke, identified himself as "Mr. Shoe," and asked the agent if he was "Mike Sullivan" (Tr. 220-221). In response to the agent's

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[1] Kapoor was indicted as a co-defendant and co-conspirator in this case but was not before the court, because he was in custody in India.

[2] "Tr." refers to the trial transcript.

[3] A recording of this conversation was played for the jury (Tr. 280-291) and a transcript introduced into evidence (Tr. 281). It was stipulated that the telephone number was registered to petitioner (Tr. 295-296).

question about his ability to distribute hashish, petitioner stated that he had received 300 pounds of hashish in January from New Delhi (Tr. 222). When asked if he had received the half of the ten rupee note, petitioner replied that he had not, but stated that he had received a telegram that morning from New Delhi informing him that "Mike Sullivan" was coming and that he was to accept delivery from him (Tr. 222-223, 229). To further prove that he was the intended recipient of the hashish, petitioner showed Burke a letter from New Delhi stating that "a lieutenant was bringing a load to him" (Tr. 223, 234-237, 259-260, 274-277). Petitioner also showed the agent a passport which indicated that petitioner had been to India about two months before (Tr. 244, 259-261) and stated that he handled all the money transactions for the India "group" (Tr. 224-225). Burke then delivered the hashish to petitioner and received money from him. At a given signal, petitioner was arrested (Tr. 229-230).

1. Petitioner contends that the facts establish entrapment as a matter of law. However, the fact that officers of the government merely afford opportunities or facilities for the commission of an offense does not establish entrapment. *United States* v. *Russell,* 411 U.S. 423; *Sherman* v. *United States,* 356 U.S. 369; *Sorrells* v. *United States,* 287 U.S. 435. Entrapment occurs "when the criminal design originates with the officials of the Government, and they implant in the mind of an innocent person the disposition to commit the alleged offense and induce its commission in order that they may prosecute." *Sorrells, supra,* 287 U.S. at 442. The evidence here shows that petitioner and Kapoor had already formed a conspiracy to smuggle drugs into the United

States before agent Burke entered the scene.[4] Burke merely afforded the means for petitioner and Kapoor to commit the offense which they had already planned. Petitioner cites *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5), and *United States* v. *Chisum*, 312 F. Supp. 1307 (C.D. Cal.), for the proposition that the government cannot supply an illegal drug and then prosecute for possession of the drug (Pet. 8). Whatever the vitality of those rulings in light of *Russell*, agent Burke did not in fact supply the hashish. The hashish was supplied by Kapoor, to be delivered to petitioner by Burke. Petitioner was not entrapped by an agent who acted merely as a conduit. See *Corcoran* v. *United States*, 427 F. 2d 16 (C.A. 9); *United States* v. *Knight*, 411 U.S. 979.

2. Petitioner claims that the court abused its discretion in refusing to grant a continuance to allow petitioner to take the deposition of Kapoor in India. However, when a continuance is sought to obtain the testimony of a witness, the defendant must show that the witness can probably be obtained if the continuance is granted and that due diligence has been used to obtain the testimony on the day set for trial. *Leino* v. *United States*, 338 F. 2d 154 (C.A. 10), *Babb* v. *United States*, 210 F. 2d 473 (C.A. 5). Here, petitioner was not diligent. He was indicted on March 22, 1972, and trial did not commence until July 5, 1972. Petitioner thus waited three and a half months without acting to obtain Kapoor's deposition. Moreover, petitioner did not show that Kapoor would have agreed to testify.

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[4] In fact, at that time petitioner and Kapoor had already committed the crime of conspiracy to import drugs, although it was necessary for Burke to act as courier to discover the identity of "Mr. Shoe."

As a co-defendant, Kapoor could not have been compelled to testify, and it is likely he would have chosen not to incriminate himself. See *Babb* v. *United States, supra.* Under these circumstances, it was not an abuse of discretion to deny the continuance.[5]

3. Petitioner contends that the court erred in admitting the hearsay statements of co-conspirator Kapoor. Hearsay declarations made by one co-conspirator in furtherance of the conspiracy are admissible against all co-conspirators. *Dutton* v. *Evans,* 400 U.S. 74. However, before they can be used against the co-conspirator, the trial judge must determine, based on the independent evidence, that a *prima facie* case of conspiracy has been established. *Carbo* v. *United States,* 314 F. 2d 718 (C.A. 9), certiorari denied, 377 U.S. 953. That was done here. The independent evidence showed that petitioner used the code name "Mr. Shoe"; stated that he had received a telegram from India to expect "Mike Sullivan"; showed the agent a letter relating to the smuggling of narcotics from India; showed the agent a passport indicating that he had recently been to India; stated that he had previously received hashish from India; and said that he handled the money transactions for the India group.

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[5] Petitioner's reliance on *Giacalone* v. *Lucas,* 445 F. 2d 1238 (C.A. 6), certiorari denied, 405 U.S. 922, and *United States* v. *White,* 324 F. 2d 814 (C.A. 2) (Pet. 11), is misplaced. In *Giacalone,* the trial court refused to grant a continuance while the defendant's chief counsel was in the hospital, and the case was tried by associate counsel. In *White,* the missing witness was a government informant who, according to the defendant's testimony, requested the narcotics for himself and a friend because they were both "sick." Here, the unavailable witness was a co-conspirator who did not play an immediate role in the dealings between petitioner and Burke.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
*Solicitor General.*

NOVEMBER 1973.